

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Ameren Services Company

)

Docket No. ER01-1786-000

COMMENTS OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to Rule 211 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.211, the Illinois Commerce Commission ("ICC") hereby submits its Comments in the above-captioned proceeding. By Notice issued April 17, 2001, FERC established May 3, 2001 as the deadline for motions to intervene or protest.

I. AMEREN'S PROPOSAL

On April 12, 2001, Ameren Services Company ("Ameren"), as agent for Union Electric Company (d/b/a AmerenUE) and Central Illinois Public Service Company (d/b/a AmerenCIPS), tendered for filing changes to the Ameren Operating Companies Open Access Transmission Tariff ("OATT"). The filing proposes to add a new section 2.3 to the Ameren OATT setting forth procedures for transmission customers to exercise the long-term firm transmission reservation priority rights specified in section 2.2 of the Ameren OATT. Proposed section 2.3 provides that,

with respect to an existing transmission customer's notification by Ameren Services of a new request for service that would conflict with the renewal of a customer's contract, the existing customer must notify Ameren Services within 30 days whether it intends to match the term of the new request, thus exercising its right of first refusal. Ameren Filing at 2-3.

In short, Ameren’s proposed Section 2.3 represents a departure from current FERC practice by requiring an existing Ameren transmission customer to decide whether to exercise its right of first refusal to match a competing offer for the transmission capacity within thirty days of whenever such a competing offer is made, rather than allowing the transmission customer a period of time up to 60 days prior to the end of its contract term to make its election.

II. AMEREN’S RATIONALE

Ameren states that it believes the procedures it proposes in section 2.3 are “superior to” the current practice. Ameren Filing at 3. Ameren states that its proposal would

maximize the use of the Ameren Services’ transmission system. Through the proposed procedures, Ameren Services would be able to accommodate new customers that have long-range plans to utilize potentially unused future transmission capacity. Ameren Filing at 4.

Ameren states that, under its proposed procedures,

a new customer would know at the time it applies for long-term service whether or not it will receive the requested service. Otherwise, Ameren Services would have to reject such new competing long-term service requests, holding the capacity available for an existing customer until 60 days before the end of the customer’s contract term. Ameren Filing at 4.

III. FERC POLICY AND PRECEDENT

FERC’s policy providing existing transmission customers a period of time up until 60 days prior to their contract’s expiration date to exercise their right of first refusal was clearly stated in its “Order Granting Complaint and Rejecting Related Service Agreements, Denying Complaint and Accepting Related Service Agreement, and Providing Clarification of Order No. 888,” Dkt. No. EL00-46-000 (June 15, 2000), (hereafter, “Entergy”). In that case, Entergy Power Marketing Corp. (“EPMC”) (the existing firm transmission contract holder) complained that Southwest Power Pool Inc. (“SPP”) (the

transmission provider) proposed to require it to exercise its right of first refusal early because SPP had received a competing offer for the transmission capacity currently contracted to EPMC. In its Order, FERC stated,

We will grant EPMC's complaint against SPP (Docket No. EL00-46-000), as discussed below. We find that SPP's OATT does not depart from the pro forma tariff and, as a result, EPMC has the right to exercise its right of first refusal until the end of the contract term. However, because the end of the contract term is more than sixty days from the date of this order, we will require EPMC to comply with the interpretation of Section 2.2 and Section 17.1 announced in this order, i.e., that the existing customer's right to execute its reservation priority at the end of the contract term, means that the existing customer, here EPMC, may exercise its right of first refusal no later than 60 days prior to the date the existing contract ends and the new service term commences, which, in this case, would be October 31, 2000. **SPP cannot compel EPMC to exercise its right of first refusal and cannot award its capacity to a competing customer prior to that date.** 91 FERC 61,276 at 61,936-61,937. Emphasis added.

FERC went on in that Entergy Order to state,

With the issuance of this order we are putting the industry on notice that, effective immediately (i.e., for contracts expiring August 31, 2000 and after), no less than sixty (60) days prior to the date the existing contract ends and the new service term commences, the existing long-term customer must make an application for its new service term following the usual pro forma tariff procedures and notify the transmission provider that it wishes to exercise its reservation priority (right of first refusal) under Section 2.2 of the pro forma tariff. To assure that existing long-term transmission customers are aware of this requirement, every transmission provider must update the business practices section on its OASIS to reflect the following clarification: "Any existing long-term customer that wishes to exercise its reservation priority must make an application for its new service term following the usual pro forma tariff procedures and notify the transmission provider, no less than sixty days (60 days) prior to the date an existing long-term contract ends and the new service term commences, that the long-term transmission customer wishes to exercise its reservation priority (right of first refusal) under Section 2.2 of the pro forma tariff." 91 FERC 61,276 at 61,937.

IV. ICC POSITION AND RECOMMENDATION

The ICC recommends that Ameren's proposed OATT section 2.3 not be approved. First, granting Ameren's request would undo the policy established by FERC in its Entergy precedent.

Second, the erosion of existing customer contract rights resulting from Ameren's proposed section 2.3 is not consistent with FERC's established practice that changes to a transmission provider's OATT will be accepted only if they are superior to the pro forma OATT. See e.g., Order 888 FERC States & Regs 31,036 at 31,770. Third, Section 2.3 creates too much opportunity for Ameren's generating and marketing affiliates to act strategically to the disadvantage of existing transmission capacity contract holders. Fourth, approving Ameren's proposal would improperly tie the hands of the Alliance RTO concerning transmission capacity contracts.

Finally, if FERC does approve Ameren's OATT section 2.3, the ICC recommends that the modification to existing customers' contract rights be limited only to those transmission contracts that expire prior to December 15, 2001, the date on which the Alliance RTO is scheduled to begin operation of the transmission facilities that Ameren is currently operating.

V. DISCUSSION

A. Ameren's Proposed Procedure Violates FERC's Entergy Policy Precedent

As quoted above, FERC's Entergy Order is quite clear: it is FERC policy that a transmission provider cannot compel an existing long-term transmission capacity contract holder to exercise its right of first refusal prior to 60 days before the customer's contract termination date and cannot award the capacity subject to a right of first refusal to a competing customer prior to that date. 91 FERC 61,276 at 61,936-61,937.

Ameren's proposal in the instant docket should be rejected on this basis alone as a violation of FERC's stated policy precedent.

B. Ameren's Proposal is not Superior to That in the Pro Forma OATT

In Order 888, the Commission expressed its willingness to entertain modifications to the terms and conditions of a utility's OATT provided that, among other things, the utility is able to "demonstrate[] that such terms and conditions are consistent with, or superior to, those in the compliance tariff [pro forma OATT]." FERC Stats & Regs 31,036 at 31,770.

Ameren has failed to satisfy FERC's "demonstration" requirement in this case. The only attempt that Ameren makes to try to show that its section 2.3 proposal is "superior" to FERC's pro forma OATT terms and conditions is the statement that its proposal would

maximize the use of the Ameren Services' transmission system. Through the proposed procedures, Ameren Services would be able to accommodate new customers that have long-range plans to utilize potentially unused future transmission capacity. Ameren Filing at 4.

While Ameren's proposed modification to the OATT terms and conditions might be superior from Ameren's perspective (i.e., "maximize the use of the Ameren Services' transmission system") and from the perspective of some unidentified potential transmission customers (i.e., "accommodate new customers"), such as Ameren's generating and marketing affiliates, it cannot be considered superior from the perspective of existing Ameren transmission capacity contract holders. Granting Ameren's request in this docket would result in considerable erosion of existing transmission customers' established contract rights.

In its Entergy Order, FERC stated that its new pro forma procedure "should provide sufficient protection to existing transmission customers (our original rationale for establishing a right of first refusal) as well as provide a reasonable and consistent notice period for all transmission reservations." 91 FERC 61,276 at 61,936. The ICC agrees that FERC's Entergy policy strikes the correct balance between the interests of existing transmission capacity contract holders, potential new transmission capacity

contract holders, and the transmission provider. Ameren's proposal would upset that carefully crafted balance.

Approval of Ameren's proposed OATT modifications would also be extremely prejudicial to current existing transmission capacity contract holders who voluntarily entered into contracts with the understanding that one element of the bargain struck was the purchase of the valuable benefit of obtaining a right of first refusal that would not have to be exercised until sixty days prior to contract expiration.

C. Ameren's Proposal Increases the Opportunity for Affiliate Preference Problems

The ICC is concerned that Ameren's proposed OATT section 2.3 increases the opportunity for Ameren and its various generation and marketing affiliates to tacitly cooperate to infringe the rights of existing transmission capacity contract holders. This result might occur through strategic transmission capacity bidding by the affiliates that may have the effect of compelling existing transmission capacity contract holders into signing longer transmission contract terms with Ameren than they otherwise would. In addition, Ameren's OATT section 2.3 would create opportunities for the Ameren affiliates to focus on tying up valuable transmission capacity for particular periods in the future.

If FERC were to allow Ameren to erode transmission capacity customers' first refusal rights, Ameren's affiliates would be in a credible position to act in ways that could easily result in capacity contract holders entering into longer term contracts that are unfavorable from their perspective so as to avoid the future threat of losing future access to transmission. Ameren's affiliate could credibly make this threat, because, absent the current customer's early exercise of its right of first refusal, Ameren's affiliate would be able to use its acquired access to transmission capacity to further leverage its existing market power in generation. The ICC is particularly sensitive to affiliate preference opportunities in this

case because Ameren's affiliates currently hold the vast majority of the generation supply in Ameren's service area. The exercise of affiliate preference transactions would make it even harder for a competitive retail market in Ameren's service area to develop.

The increased transmission reservation efficiency benefits of Ameren's proposal, if any, do not outweigh the risks of increased affiliate abuse problems.

D. Ameren's Proposal Would Improperly Tie the Hands of the Alliance RTO Concerning Transmission Capacity Contracts

In a separate docket, Ameren requested FERC authorization to transfer operation of its transmission system to the Alliance RTO. See e.g., Docket No. ER01-966-000. Section 2.1 of the Alliance RTO's proposed OATT states that,

Firm transmission service reservations and priorities existing with respect to a Transmission Owner's system immediately prior to the Transmission Service Date shall be recognized and adopted respecting service provided by the Alliance RTO. Underlining added.

The ICC reads this language to mean that, if FERC approves Ameren's proposal in the instant docket, the Alliance RTO will be required to respect the contract reservations that Ameren is able to secure prior to December 15, 2001, regardless of the period of time in the future for which those capacity reservations would be effective. This interpretation means that, if existing transmission capacity contract holders are compelled by section 2.3 between now and December 15, 2001 (when the Ameren OATT will be superseded by the Alliance RTO OATT) to prematurely extend their contracts, or, alternatively, to release their right of first refusal such that Ameren is freed to contract that capacity with competing transmission customers, the Alliance RTO will be obligated to respect those results.

The ICC believes that Ameren's proposed section 2.3 would unduly tie the hands of the prospective Alliance RTO. If the proposed OATT modification to existing and potential transmission

customer rights is needed for the reasons identified by Ameren in the instant filing, or for other reasons, it can be expected that such modification will be proposed by an independent RTO. Presumably, such filings from an independent RTO would be received with much less suspicion than is the case when such filings are made by vertically integrated electric utilities, such as Ameren, which can be expected to have conflicting generation service and transmission service interests. See e.g., PJM Interconnection, L.L.C., 92 FERC 61,178 (August 28, 2000).

The Alliance RTO is scheduled to begin operations on December 15, 2001. That is only a little more than seven months from the date of this filing. The Commission should refrain, at this time, from approving proposals from vertically-integrated utilities, such as Ameren, that will unnecessarily tie the hands of the new RTOs for unspecified periods in the future when those time periods both begin and end during the time when transmission service is expected to be under the operational control of the RTO.

E. If Ameren's Proposal Is Approved, Its Applicability Should be Limited Only to Contracts Scheduled to Expire Prior to December 15, 2001

Finally, if, contrary to the ICC's recommendation, the FERC approves Ameren's OATT Section 2.3 proposal, that approval should be limited so that it is applicable only to transmission capacity contracts expiring prior to December 15, 2001. Such limited approval would represent only a limited infringement on existing transmission customer contract rights and would only minimally affect the Alliance RTO's flexibility concerning transmission capacity contracting. On the other hand, if there are transmission reservation efficiency benefits to be gained through implementation of Ameren's proposed procedures (as argued by Ameren), those gains can be captured for the limited universe of capacity contracts expiring in the near term. In the longer term, i.e., for the period beginning December 15,

2001, Ameren would retain its full rights to petition the Alliance RTO to modify its proposed OATT along the lines of Ameren's proposed section 2.3 procedures.

VI. CONCLUSION

WHEREFORE, for each of the aforesated reasons, the Illinois Commerce Commission respectfully requests that the Commission not approve Ameren's proposed OATT section 2.3. However, if the Commission does grant approval, the ICC requests that the applicability of Ameren's proposed OATT modification be limited to transmission capacity contracts that expire prior to December 15, 2001.

May 2, 2001

Respectfully submitted,

/S/ RANDY RISMILLER

Randy Rismiller

Manager, Federal Energy Program

ILLINOIS COMMERCE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Comments of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, copies of which are attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Springfield, Illinois, this 2nd day of May, 2001.

Respectfully submitted,

/S/ RANDY RISMILLER
Randy Rismiller
Manager, Federal Energy Program
ILLINOIS COMMERCE COMMISSION